

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY STEVEN MCDONALD,

Defendant and Appellant.

E059138

(Super.Ct.No. FVI1301708)

OPINION

APPEAL from the Superior Court of San Bernardino County. John P.

Vander Feer, Judge. Affirmed with directions.

Beatrice C. Tillman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, and Kristen Kinnaird Chenelia, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Jeffrey Steven McDonald was charged by felony complaint with transporting a controlled substance (Health & Saf. Code,¹ § 11379, subd. (a), count 1) and possession of a controlled substance for sale (Health & Saf. Code, § 11378, count 2). It was also alleged that he had five prior drug convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a), and that he served six prior prison terms (Pen. Code, § 667.5, subd. (b)). Pursuant to a plea agreement, defendant pled guilty to count 1, and he admitted that he suffered one prior drug conviction, within the meaning of Health and Safety Code section 11370.2, subdivision (a). In exchange, the trial court dismissed the remaining counts and allegations and sentenced defendant to seven years in county prison.

Counsel for defendant originally filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493]. Pursuant to Government Code section 68081,² we requested the parties to file supplemental briefs on the issue of whether the trial court properly sentenced defendant on the prior drug conviction under Health and Safety Code section 11370.2, subdivision (a), or whether the parties intended for the court to sentence him under section 11370.2, subdivision (c).

¹ All further statutory references will be to the Health and Safety Code, unless otherwise noted.

² Government Code section 68081 provides, in pertinent part: “Before . . . a court of appeal . . . renders a decision in a proceeding . . . based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing.”

Upon reviewing the supplemental briefing, we conclude that the parties intended to proceed under section 11370.2, subdivision (c). Therefore, we will direct the trial court to modify the judgment to reflect that defendant was sentenced to an enhancement under section 11370.2, subdivision (c). In all other respects, we affirm.

PROCEDURAL BACKGROUND

Defendant entered a plea agreement and pled guilty to the crime of transportation of a controlled substance, a felony. (§ 11379, subd. (a).) He also admitted, within the meaning of section 11370.2, subdivision (a), that he was previously convicted of transportation of a controlled substance. (§ 11379, subd. (a).) The court sentenced defendant to four years in county prison on count 1, plus a consecutive three years on the prior drug conviction.

ANALYSIS

The Record Demonstrates That the Parties Intended to Proceed Under

Section 11370.2, Subdivision (c)

Defendant was charged with and admitted that he had one prior drug conviction (§ 11379, subd. (a)), within the meaning of section 11370.2, subdivision (a). As the parties agree, his conduct, as charged and admitted, did not subject him to enhanced punishment under section 11370.2, subdivision (a), but rather under section 11370.2, subdivision (c). Defendant asserts that this court should, therefore, set aside the judgment and remand the case so that he can properly admit and be sentenced pursuant to the correct subdivision. The People contend, and we agree, that it is appropriate for this court to correct the error.

Section 11370.2 provides sentence enhancements for certain drug offenders with prior drug-related felony convictions. Subdivisions (a) through (c) list different qualifying current convictions, and they impose a consecutive three-year enhancement for each qualifying prior drug conviction. Subdivision (a) applies to any person currently convicted of a violation of section 11351, 11351.5, or 11352. (§ 11370.2, subd. (a).) Subdivision (c) applies to any person currently convicted of a violation of section 11378 or 11379. (§ 11370.2, subd. (c).)

Here, the complaint alleged, and defendant admitted, that he had a prior drug conviction, within the meaning of section 11370.2, subdivision (a). Therefore, the court sentenced him to an additional three years under section 11370.2, subdivision (a). However, defendant's current offense was for a violation of section 11379, subdivision (a). Thus, he was only subject to an enhancement under section 11370.2, subdivision (c), since that subdivision lists his present offense as a qualifying current conviction, while subdivision (a) does not.

Defendant now contends that because he was charged with and admitted an enhancement that was unauthorized and had no legal effect, this court should set aside the judgment and remand the case for a proper admission and sentencing pursuant to section 11370.2, subdivision (c). However, the initial allegation of the wrong subdivision in the complaint appears to have been a clerical mistake that simply carried through the rest of the proceedings. Generally, a clerical error is one inadvertently made. (*People v. Schultz* (1965) 238 Cal.App.2d 804, 808.) Clerical error can be made by a clerk, by counsel, or by the court itself. (*Ibid.* [judge misspoke].) Furthermore, defendant admitted that he

had a prior drug conviction for transportation of a controlled substance (§ 11379, subd. (a)), which is the basis for an enhancement under section 11370.2, subdivision (c), as well as subdivision (a). Neither party mentioned that defendant's present offense did not support an enhancement under section 11370.2, subdivision (a), below or on appeal. Thus, it appears that the parties understood and intended for defendant to be charged with and admit the prior drug conviction within the meaning of section 11370.2, subdivision (c). We note that defendant was not prejudiced by the inadvertent allegation of the wrong subdivision, since both subdivisions (a) and (c) carry a consecutive three-year enhancement.

In light of the parties' agreement that the applicable subdivision regarding the prior drug conviction is section 11370.2, subdivision (c), and in the interest of judicial economy, it is appropriate for this court to correct the error. (*In re Candelario* (1970) 3 Cal.3d 702, 705 [A court "has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts"].) Accordingly, we will direct the trial court to amend the sentencing minute order to reflect that defendant was sentenced to a three-year enhancement under section 11370.2, subdivision (c).³

³ We note that since defendant was sentenced to county prison pursuant to Penal Code section 1170, subdivision (h), there is no abstract of judgment. Rather, there is a prison commitment memorandum. Since such memorandum only reflects that defendant was sentenced to a total term of seven years, without specifying the enhancement, there is no need to amend it.

DISPOSITION

The trial court is directed to amend the sentencing minute order to reflect that defendant was sentenced to a three-year enhancement under Health and Safety Code section 11370.2, subdivision (c). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

KING
J.